No. 12,815

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

STATE CENTER WAREHOUSE AND COLD STORAGE COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT.

HOWARD B. THOMAS,
1001 Helm Building, Fresno 1, California,
Attorney for Respondent.

Subject Index

Table of Authorities Cited

Statutes

Administrative Regulations

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JURISDICTION.

On October 25, 1949, the General Counsel of the National Labor Relations Board issued on behalf of the Board, pursuant to Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Sec. 151 *et seq.*), hereinafter called the Act, a complaint alleging that Respondent had committed and was committing at Fresno, California, certain acts constituting unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act (R. 3-7). Respondent, in accordance with Section 101.8 of the Board's Statement of Procedure (Tit. 29,

Code of Federal Regulations, Subtitle B, Ch. I, Sec. 101.8), filed with the Board an answer denying commission of unfair labor practices (R. 7-9). After hearing the Board's Trial Examiner issued an Intermediate Report and Recommended Order (R. 10-44), as required by Section 101.45 of the Board's Statement of Procedure. Respondent excepted to the Intermediate Report and Recommended Order pursuant to Section 101.46 of the Board's Statement of Procedure (R. 64-73). The Board, on August 24, 1950, issued against Respondent a Decision and Order, 90 N.L.R.B. No. 300, ordering Respondent to cease and desist from certain conduct and to take specified affirmative action (R. 64-71). In this proceeding the Board petitions the Court for enforcement of its Order pursuant to Section 10(e) of the Act.

STATEMENT OF THE CASE.

I. SUMMARY OF FACTS.

The evidence in this case consists almost entirely of the testimony of Respondent's officers, of four men whom Respondent at material times employed as warehousemen and of the mother-in-law of one of them, of one of Respondent's office girls, of Respondent's general operating manager, and of Michael Sohigian, a supervisor at a firm known as Industrial Scientific Company. Some of the testimony was in conflict and that of several witnesses was confused and self-contradictory. This may have been due partially to unfamiliarity of some of the witnesses with

the English language (R. 15-16), or to the unreliability of some of the witnesses, especially Moses Machoian (R. 18-19). It therefore is difficult to reconstruct the facts in this case from the record. The summary which follows has necessarily been assembled only in part from uncontradicted testimony.[1]

A. Background of the case.

Respondent is a small family corporation which operates one warehouse located at Fresno, California (R. 4, 8). Respondent is managed by Mrs. Twodi P. Mosesian, a widow, with the assistance of her daughters, Louise Mosesian and Mary Mosesian (R. 161-162, 197-199, 208). Respondent's warehouse building contains offices and storage space and has an open loading platform from which railroad cars are loaded and unloaded (R. 86, 88, 240). Respondent regularly employs only four or five men in its warehouse. During the period material to this case, Respondent's warehousemen were Moses Machoian, Eddie Ejadian, Bob Krikorian, Harry Ekzoozian, and Bill Eccles (R. 17), the first four of whom testified at the hearing before the Trial Examiner. Respondent employed W. H. Justice as its general operating manager (R. 263).

Late in January, 1949, Respondent was notified by a labor relations consultant, one Bob Franklin, that Local No. 131 of the International Brotherhood of

[1]Where the testimony conflicts as to an incident included in this statement, citations to contradictory testimony follow the symbol "cf." Citations to the Intermediate Report of the Trial Examiner or to the Board's decision and Order follow the semicolons in the references to the record.

Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as the Union) was seeking to organize the warehouse (R. 133). Franklin advised the Mosesians that it was necessary for Respondent to have a representation election (R. 134). The Mosesians instructed Franklin to take the necessary steps for the holding of a representation election. On February 10, 1949, a letter from the Board was mailed to Respondent informing it that the Union had filed a representation petition. The election took place March 10, 1949. On March 18, 1949, the Board certified the Union as the bargaining representative of Respondent's warehouse and truck driver employees (R. 17).

B. The alleged unfair labor practices.

Respondent does a general warehouse business (R. 14-15) in the course of which it commonly stores inflammable goods (R. 98-99). Therefore, Respondent has for thirty years maintained stencilled "No Smoking" signs inside the warehouse which are visible to anyone working in the warehouse (R. 162-164, 196). Mrs. Mosesian hires the warehouse employees, and when she does so she instructs them not to smoke inside the warehouse (R. 223, 224, 246-247, 252, cf. R. 88-89; 27). W. H. Justice, Respondent's general operating manager, also warns the employees not to smoke inside the warehouse (R. 264, 266). The employees, or some of them, sometimes (R. 88) smoked inside the warehouse in violation of these instructions (R. 126-128, 225, 256), but they were careful not to do so in front of the Mosesians (R. 252, 262). They feared

that they would be discharged if caught smoking (R. 246). Mrs. Mosesian and Louise Mosesian each reprimanded the men whenever they caught them smoking (R. 192-194, 252, 269). Shortly before the period involved in this case, Respondent discharged an employee named Bob Mirikian for smoking in the warehouse (R. 217; cf. R. 31).

On or about November 18, 1948, Moses Machoian, in the company of his wife and of Harry Ekzoozian and his wife, visited Mrs. Mosesian at her home. Machoian asked for a job in Respondent's warehouse. Mrs. Mosesian hired Machoian and told him that there was no smoking in the building (R. 165-167, 226-227, 268-269; cf. R. 89, 99-101). Machoian had previously worked at Industrial Scientific Company, where his boss was Michael Sohigian (R. 97). Machoian was discharged by that firm because of his inefficiency (R. 141-142) and possibly because he was dissatisfied with the pay (R. 97-98).

Despite Respondent's "No Smoking" signs and warnings against smoking in the building, Machoian smoked inside the warehouse almost from the date he was hired (R. 88, 141, 192-195, 227-228, 269). He was repeatedly reprimanded by Louise Mosesian and Mrs. Mosesian, but nevertheless persisted (R. 175, 193-195, 269, cf. R. 88). Machoian also sang and danced inside the warehouse (R. 90, 252, 257-258; 32). In December, 1948, shortly after he was hired, Louise Mosesian heard Machoian singing Turkish songs at the top of his lungs. She came out of the office into

the warehouse proper and saw Machoian snapping his fingers and jumping about. She reprimanded him for this conduct (R. 167-169, 232, cf. R. 130-131; R. 32), as she had similarly reprimanded Krikorian (R. 258-259). Nevertheless, Machoian on later occasions indulged in singing and dancing inside the warehouse during working hours, and was again reprimanded by Louise (R. 169-170). Louise reported Machoian's smoking, singing and dancing to Mrs. Mosesian, who had the final say on hiring and firing employees (R. 161-162, 170, 197-198).

In January, 1949, the warehouse employees became interested in Local No. 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The lead in organizing the men was taken by employee Krikorian (R. 119-121; 66). The men actually joined the Union at the end of January (R. 79; 17).

Just after New Year's Day, 1949, Michael Sohigian, Machoian's former boss, stopped in to visit the Mosesians at their home. Employee Ekzoozian and his wife were also present. During the course of a general conversation Louise Mosesian mentioned that one of Respondent's employees indulged in singing and dancing, and also smoked in violation of the warehouse rule against smoking. Mr. Sohigian then said that he had had a similar employee, whose work had been most unsatisfactory. They then discovered that Machoian was the person that each had in mind (R. 136-139, 140-142).

The next day, apparently, or a few days thereafter (R. 170-171, 236-237, 242-245, cf. R. 81, 255), Ekzoozian, while at work in a box car, told Machoian that he had seen Mr. Sohigian the night before at the Mosesians' home and that Sohigian had said that he had discharged Machoian because of his inefficiency (R. 243-244). Machoian then may have accused Ekzoozian of having told the Mosesians that Machoian had been in Union activities at Industrial Scientific Company and that he had been discharged there because of such activities (R. 82-83, 255, cf. R. 236-237, 240-241, 243-244). A loud argument developed. The noise attracted Louise Mosesian, who merely told the men to get to work (R. 170-175, 237, 240, 242, cf. R. 255, cf. also R. 80-81). Ekzoozian then left the box car in anger, saying that he was going to get Machoian fired and headed towards Respondent's office (R. 83-84, 260, cf. R. 237, 241).[2] However, it does not appear

[2]The Trial Examiner evidently concluded that this box car incident occurred at a later date, sometime in February, 1949 (R. 20-22), rather than about the first of the year. Respondent concludes that this incident occurred about the first of the year because Ekzoozian testified that the night before the incident, Mr. Sohigian told him that Machoian had broken material at his plant (R. 243). The only occasion testified to in this case on which Sohigian made any statement to Ekzoozian about Machoian was the occasion of Mr. Sohigian's visit to the Mosesians discussed above, which occurred about the end of 1948. Krikorian testified (R. 255) he did not know whether this box car incident, which involved the argument between Ekzoozian and Machoian, had occurred before or after another box car incident with reference to which the Trial Examiner (R. 20-22) fixed the date of the incidents here discussed, apparently on the basis of Machoian's testimony (R. 81). Respondent's chronology of this incident, and not the Trial Examiner's, is correct, since all the testimony concerning this incident, including that of Machoian, refers to an argument which occurred between Machoian and Ekzoozian over

that Ekzoozian actually got to the office or talked to any of the Mosesians about Machoian (R. 83-84, 260-261). Later the same day, employee Krikorian asked Louise Mosesian if she was going to fire Machoian, and she answered, "No, he is a good worker." (R. 261).

Machoian and Krikorian testified (R. 77-80, 108, 114-116, 253-255, 259) to another box car incident which apparently occurred sometime between January 15, 1949 and March 1, 1949. Machoian and Krikorian testified that on this occasion, the warehousemen, Machoian, Ejadian, Ekzoozian and Krikorian, were working in a box car, when Louise Mosesian came into the car and asked if anyone had spoken to anybody. Everyone said, "No." She then is said to have asked each man individually if he had joined the Union. Each said, "No." She then is supposed to have said, "I know who has already signed, but you don't have to tell me. I am going to find out anyway." According to Krikorian's testimony, she then asked Ekzoozian whether Mama (Mrs. Mosesian) had not always kept four or five men working in the warehouse, even in tough times, and Ekzoozian agreed. Finally, she is supposed to have said, "Mama could always shut it or rent it out, the warehouse." Louise Mosesian, on the other hand, testified that she had never during the period of Machoian's em-

statements supposed to have been made by Sohigian to Ekzoozian very recently. Nevertheless, for the sake of clarity, the box car incident in which the argument occurred will hereinafter be referred to as the second box car incident, and the other box car incident will be referred to as the first box car incident.

ployment talked to the men in the box car, except once when she found Machoian and Ekzoozian arguing. This apparently was the second box car incident already discussed, when Machoian and Ekzoozian argued about whether Sohigian was in town and what he had said. She testified that she merely stopped the argument in order to get the men to work (R. 172-174). Ekzoozian testified that Louise had talked to the men in the box car, but only to urge them to work, and that she had never mentioned the Union to the men (R. 234-236, 240-241). Ejadian could not remember whether Louise had ever mentioned the Union to him (R. 153-154).

The only occasions before the election other than those already discussed upon which any of the Mosesians directly or indirectly mentioned the Union to the employees were once before the election, when Louise Mosesian said to Krikorian that she knew he would vote against the Union, and asked him how Ejadian would vote (R. 261), and again, on or about the date of the election, when Mary Mosesian told the men that that was the election date and that they were to vote as they pleased (R. 123-124, 208, 232-233, 271). After the election the Union was never mentioned at all to the employees other than Ejadian (R. 84). There was testimony that after Machoian's discharge, sometime in May or June, 1949, Mrs. Mosesian told her housekeeper, Agnes Azidigian, that if Eddie Ejadian, Agnes' son-in-law, or the other workers belonged to the Union, she would discharge them

and get better workers, and that she should tell Ejadian this. Machoian was not mentioned in this conversation. Mrs. Azidigian testified that she repeated this statement to Ejadian some time later (R. 179-184, cf. R. 155-160). Mrs. Mosesian denied having made any such statement to Mrs. Azidigian (R. 272).

On April 12, 1949, which was a pay day, Mrs. Mosesian discharged Machoian. In the morning, Mrs. Mosesian saw Machoian smoking in the warehouse and reprimanded him. He put his cigarette out. In the afternoon, she again found Machoian smoking in the warehouse. She went into the office and told Violet Misikian, an office employee, to go into the warehouse and tell Machoian to come into the office before going home. Violet then went into the warehouse and told Machoian that when he got his pay check at the end of the day, he was to come into the office to see Mrs. Mosesian. Machoian, however, did not come into the office at quitting time, so Mrs. Mosesian went out to the platform just as he was leaving and told him he was discharged. He then went to his car where Ekzoozian, who rode to and from work with him, was waiting, and told Ekzoozian that Mrs. Mosesian had told him not to come back to work. The testimony was in conflict as to whether or not Mrs. Mosesian gave Machoian any reason for his discharge (R. 84-87, 211-216, 220-223, 228-232, 269-271, cf. R. 104-107).

C. The Intermediate Report and the Board's Order.

The Intermediate Report of the Trial Examiner held that Respondent engaged in interference, restraint and coercion, within the meaning of Section 8(a)(1), as follows: by Louise Mosesian's inquiries and statements to the warehousemen in the box car, by Louise Mosesian's statement to Krikorian that she knew he would vote against the Union in the election and her inquiry of him as to how Ejadian would vote, and by Mrs. Mosesian's message to Ejadian that if the warehouse became Union, she would discharge the present employees (R. 25). The Report further held that Respondent had not discharged Machoian for smoking or for singing and dancing (R. 30, 32, 33), that Respondent's "series of shifting and implausible reasons * * * fail to explain Machoian's discharge on a nondiscriminatory basis" and that the assertion of such reasons pointed to a discriminatory motive in the discharge (R. 34). With respect to the affirmative evidence of discriminatory discharge required to carry the burden of proof thereof (Section 101.10, of the Board's Statement of Procedure) the Report stated that the Mosesians knew that Machoian took the lead in Union activities, that employee Ekzoozian had threatened to have Machoian fired, and that Respondent "was determined from the outset to defeat Union organization in the warehouse" (R. 35-36).

The Recommended Order recommended that Machoian, who did not wish reinstatement (R. 90; 37), be given back pay for a period after his discharge, that Respondent cease and desist from committing

unfair labor practices, and that Respondent post a notice to employees that it would not discourage Union membership (R. 37-44).

Respondent filed written exceptions to the findings of fact and conclusion of law in the Report and to the Recommended Order (R. 45-63). The Board in its Decision and Order (R. 64-71) did not state findings of fact. It agreed that Respondent had violated Section 8(a)(1) of the Act by Louise Mosesian's statements in the box car and by Mrs. Mosesian's message through Mrs. Azidigian to Ejadian (R. 66). The Board did not agree that Respondent had no rule against smoking or that Machoian was the leader in Union activities in Respondent's warehouse. Nevertheless, the Board found that Respondent discriminatorily discharged Machoian. The Board held the discriminatory discharge to have been established by Respondent's anti-Union animus, as shown by threats and interrogation, by belief of Respondent's officers that Machoian brought the Union into the warehouse, and apparently by the unpersuasiveness of Respondent's defense (R. 66-67). There was no statement of the reasons for or basis of the Board's findings, nor was there a finding of danger that Respondent would commit future unfair labor practices. The Board substantially affirmed the Recommended Order of the Trial Examiner (R. 69-73), without passing upon Respondent's exceptions.

II. QUESTIONS PRESENTED.

1. Did Respondent discriminate in regard to the hire or tenure of employment of Moses Machoian for the purpose of discouraging membership in any labor organization, or did Respondent discharge Moses Machoian because of his persistent disregard of Respondent's working rules and regulations?

2. Did any of Respondent's officers ever engage in interference, restraint and coercion of employees in the exercise of the rights guaranteed in Section 7 of the Act, within the meaning of Section 8(a)(1) of the Act?

3. Was Respondent denied a fair hearing in this case by reason of the bias of the Trial Examiner and of the National Labor Relations Board?

4. Is the Board's order improper because there is no showing that there is danger that Respondent will engage in unfair labor practices?

5. Is the Board's order invalid because it does not show the Board's ruling on each of Respondent's exceptions and because it does not include a statement of the reasons or basis for the Board's findings and conclusions, as required by Section 8(b) of the Administrative Procedure Act, 60 Stat. 242, 5 U.S.C. Sec. 1007(b)?

6. Is the Board's order invalid because the Board did not state its findings of fact as required by Section 10(c) of the National Labor Relations Act?

SPECIFICATION OF ERRORS.

I. THE DISCRIMINATORY DISCHARGE ISSUE.

The Board erred in respect of the discriminatory discharge issue in finding contrary to the preponderance of the testimony taken:

1. That the Respondent discriminatorily discharged Moses Machoian in violation of Section 8(a)(3) of the Act.

2. That Respondent did not discharge Moses Machoian because he persisted in smoking in violation of Respondent's working rule and because he sang and danced in Respondent's warehouse during working hours (R. 167-170, 175, 187-188, 192-199, 211-216, 220-223, 227-232, 252, 269-271; 66-67).

3. That Respondent's officers believed that Machoian was responsible for bringing the Union into the warehouse (R. 139-143, 148-152, 176, 255, 260-261, 271; 66).

4. That during the period of Machoian's employment, Respondent's no smoking rule was rarely enforced (R. 216-217, 225, 246, 252, 262; 67).

5. That Machoian was never warned that smoking in the warehouse would result in his discharge (R. 187, 192-196, 269; 67).

6. That Machoian was not told that he was discharged because he smoked in Respondent's warehouse (R. 271; 67).

7. By implication, that Respondent's officers had an "anti-Union animus" (R. 253-254, 261, 272; 66).

II. THE INTERFERENCE, RESTRAINT AND COERCION ISSUE.

The Board erred in respect of the interference, coercion and restraint issue in holding and finding contrary to the preponderance of the testimony taken:

1. That the Respondent interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act.

2. That Respondent's officers, Louise Mosesian and Twodi Mosesian, interrogated Respondent's employees as to Union activities and threatened to close the warehouse (R. 175, 254, 271; 66).

3. That Louise Mosesian and Twodi Mosesian made any coercive statements and indulged in coercive conduct (R. 175, 254, 271; 66).

III. THE BIAS ISSUE.

The Board erred in respect of the bias issue: in adopting and affirming the Intermediate Report and Recommended Order of the Trial Examiner, although it was demonstrated in Respondent's exceptions to such Order and Report that the Trial Examiner was biased against Respondent (R. 45-63).

IV. THE ISSUE WITH RESPECT TO THE PROPRIETY AND VALIDITY OF THE BOARD'S ORDER.

The Board erred:

1. In issuing a cease and desist order against Respondent, although it did not find and there is no

evidence that there is danger that Respondent will continue its alleged violations of the Act (R. 64-67).

2. In failing in its Decision and Order to state the reasons or basis for its findings and conclusions, as required by Section 8(b) of the Administrative Procedure Act (R. 64-67).

3. In failing in its Decision and Order to make a ruling upon each exception presented by Respondent to the Intermediate Report and Recommended Order, as required by Section 8(b) of the Administrative Procedure Act (R. 64-67).

4. In failing to state its findings of fact, as required by Section 10(c) of the Act (R. 64-67).

ARGUMENT.

This case is primarily an evidence case. The decision of this Court upon the first three issues will depend upon the result of the Court's study of the record in the case. The Court, in making this study and in drawing its conclusions therefrom, will, however, no longer be bound by the former rule that it must affirm the Board's order if it can find evidence in the record to support the order. See *N.L.R.B. v. Waterman Steamship Corp.,* 309 U.S. 206, 60 S. Ct. 493 (1940). The findings of the Board are now conclusive with respect to questions of fact only "if supported by substantial evidence on the record considered as a whole." Section 10(e) of the Act. In

Universal Camera Corp. v. N.L.R.B., ... U.S. ....., 71 S. Ct. 456 (1951), the Court noted that under Section 10(e) as it read prior to its 1947 amendment by the Taft-Hartley Act, the courts held that findings of the Board must be affirmed if "the reviewing Court could find in the Record evidence which, when viewed in isolation, substantiated the Board's findings." Id., 459. The Court held that this rule of affirmance had been changed by the 1947 amendment of Section 10(e) in the Taft-Hartley Act and by the Administrative Procedure Act. The Court said that new legislation "definitely precludes" a reviewing court from determining "substantiality of evidence supporting a labor board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence, or evidence from which conflicting inferences could be drawn." Id., 464. The Court said that a reviewing court "is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." Id., 465. Reviewing courts must now evaluate the worth of the testimony of witnesses since the Board's findings must "be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or it conforms judgment on matters within its special competence, or both." Id., 466.

Respondent's position is that there is no evidence in the record to support the holding that Respondent committed unfair labor practices, so that enforcement of the Board's order should be denied under any theory of the scope of review. Under the new theory of a broad scope of review, as announced by the Supreme Court in the *Universal Camera* case, supra, this Court will find the evidence overwhelmingly against the conclusions that unfair labor practices occurred and that the record demonstrates that the Board's order should not be enforced in any respect.

I. THE FINDING OF THE BOARD THAT RESPONDENT DISCRIMINATORILY DISCHARGED MOSES MACHOIAN IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE, OR BY ANY EVIDENCE AT ALL, BUT ON THE CONTRARY, THE EVIDENCE SHOWS THAT RESPONDENT DISCHARGED MACHOIAN FOR CAUSE.

The Board had the burden of proof throughout this proceeding to establish that Respondent discriminatorily discharged Machoian. When and if the Board introduced sufficient evidence which if uncontested or unrefuted would establish a discriminatory discharge, then the Respondent had a burden of coming forward with evidence that the discharge was not discriminatory. *Montgomery Ward and Company v. N.L.R.B.,* 107 F. (2d) 555 (C.C.A. 7th, 1939); *N.L.R.B. v. Fruehauf Trailer Company,* 301 U.S. 49, 57 S. Ct. 642 (1937). The first question, therefore, is whether the Board introduced evidence which, if

it stood alone, would have established that Respondent discriminatorily discharged Machoian.

A. THERE IS NO AFFIRMATIVE EVIDENCE TO SUSTAIN THE CONCLUSION THAT RESPONDENT DISCRIMINATORILY DISCHARGED MOSES MACHOIAN.

Insofar as it is possible to determine from the Board's Decision and Order what were its findings of fact with respect to the issue of discriminatory discharge, it appears (R. 66-67) that the Board found facts showing that Respondent discriminatorily discharged Machoian in the following particulars:

(1) Respondent's officials had an "anti-Union animus."

(2) The credited testimony of Krikorian and Sohigian showed that Respondent's officers believed that Machoian brought the Union into Respondent's warehouse.

(3) Respondent's defense that it discharged Machoian for smoking is most unpersuasive.

These findings of fact are similar to those of the Trial Examiner. He found (R. 35) that the Mosesians were aware that Machoian was the leader in bringing the Union into the warehouse. In support of this finding he cited testimony of Mr. Sohigian that he had discussed Machoian's Union activities with the Mosesians, employee Ekzoozian's accusation of Machoian as the Union organizer, and Ekzoozian's threat to have Machoian fired for Union activities. The Trial Examiner also relied upon Respondent's

determination to defeat Union organization, as shown by statements, inquiries and threats of Respondent's officers and by Mrs. Mosesian's message to Ejadian that if the warehouse became Union, she would get other workers (R. 35-36). The Board, in substance, adopted these findings with the exception that it refused to adopt the finding that Machoian took the lead in bringing the Union into the warehouse.

The essential affirmative elements of the Board's case are, then, its findings that Respondent's officials opposed organization of the warehouse and that Respondent's officials believed that Machoian was taking some part in the organization of the warehouse. If the first of these elements is not supported by the record then there is no finding in the record to show that Machoian's discharge could have been discriminatorily motivated, and the conclusion of discriminatory discharge falls. Further, if the finding of anti-Union animus finds support in the record, but the finding that Respondent believed Machoian was active in Union organization is not supported, the conclusion that Machoian was discriminatorily discharged must fall. If it is shown only that an employer is opposed to Union organization of his plant and that certain of his employees who were discharged were Union members, then a charge of discriminatory discharge may not stand. *N.L.R.B. v. Goodyear Tire and Rubber Co.,* 129 F. (2d) 661 (C.C.A. 5th, 1942); *N.L.R.B. v. Montgomery Ward & Co.,* 157 F. (2d) 486 (C.C.A. 8th, 1946).

Examination of all the testimony in the record which bears upon the Board's affirmative case shows that the Board's finding that the Mosesians believed that Machoian organized the warehouse is not supported by substantial evidence on the record considered as a whole. The testimony of the witnesses relevant to this finding may be summarized as follows:

Mr. Sohigian testified that he discussed Machoian with Louise Mosesian on more than one occasion; that he was of the impression that the first occasion was a visit by him to the Mosesians' house during the holiday season at the end of 1948; that on this occasion it was mentioned in conversation that someone working at Respondent's warehouse indulged in offensive conduct, smoking and singing loudly, that this employee was Machoian, that Machoian had worked under Mr. Sohigian, and that Mr. Sohigian had discharged Machoian for incompetence and inefficiency (R. 140-142). Sohigian testified that he did not remember definitely whether or not he had on this occasion discussed Machoian's Union activities with the Mosesians (R. 151). Sohigian testified that he had discussed Machoian—without saying in what respects—with Louise Mosesian and with the other Mosesians on a subsequent occasion at the Mosesians' home, but that he could not fix the date of this occasion even approximately (R. 143). He did not remember whether on this occasion an N.L.R.B. election was discussed, although it could have been discussed then (R. 147). He said that Machoian's Union ac-

tivity also could have been discussed on this occasion (R. 148). Sohigian testified that on some occasion or occasions he discussed both the election and Machoian's Union activities with Louise Mosesian, but that he could not recollect independently whether or not Machoian was discussed at the same time that the election was discussed or whether the discussion of Machoian occurred before or after the discussion of the election (R. 148-152). He did not testify as to the content of his discussion with the Mosesians of Machoian's Union activity. He did not know whether the discussion of the election came up before or after it occurred because he did not know if the election ever had occurred (R. 152). Mr. Sohigian was apparently confronted with a statement to which he may have sworn for the purpose of refreshing his recollection (R. 143-148). In this statement Mr. Sohigian was supposed to have said, "Sometime before the Union election at State Center Warehouse Cold Storage Company Louise Mosesian telephoned me" (R. 144). Mr. Sohigian said that this statement did not refresh his recollection on a second meeting with Louise Mosesian and that he had no independent memory of any such meeting (R. 144). Mr. Sohigian said further that the statement, "refreshes my mind only insofar as—well, I can't point out exactly here" (R. 148).

The testimony of Machoian, so far as relevant, can be summarized as follows: He testified that he became interested in joining a Union, but that Re-

spondent never said anything to him about it (R. 76, 122); that he decided to join the Union in January, 1948 (R. 119) (the witness must have meant 1949); that he started talking about the Union first to Bob [Krikorian] (R. 120); that after he talked to Krikorian then Krikorian "started talking to the other fellows and we come all together and went over to the Union and signed up" (R. 121). Machoian testified that on a certain occasion in a box car, Louise Mosesian asked him if he had signed any papers, said that Respondent didn't want "union in this," and then said she was going over to the Union to find out if he joined the Union (R. 77-81, 108, 114-115); that on a later occasion Louise Mosesian again spoke to him in a box car and said that Machoian had organized for the Union at Mr. Sohigian's place of business and that Machoian had organized the warehouse (R. 81, 113). Machoian testified that immediately after this second speech to him by Louise, he accused employee Ekzoozian of telling the Mosesians that he had been discharged by Mr. Sohigian by reason of Union activities (R. 83), that they argued about this, and that Ekzoozian then left the box car, apparently for Respondent's office, saying that he was going to tell Respondent to lay Machoian off because the "Union can't work any more over here" (R. 83). Machoian testified that Mr. Sohigian had discharged him "for the Union," although Mr. Sohigian had not said so to him when he discharged him (R. 97-98).

Employee Ejadian testified only that Krikorian talked to him about the Union and that Machoian talked to him later on (R. 53).

Employee Ekzoozian testified that Mr. Sohigian had said to him one evening, apparently prior to any box car incident, that Machoian had worked in his, Sohigian's, plant and "broke the die, broke the pipe over there" (R. 243), and that nothing else was said by Mr. Sohigian on that occasion or at any other time previously about Machoian (R. 243, 245). Ekzoozian testified that he told Machoian about this the next day (R. 244), and that the ensuing box car argument about which Machoian testified was over whether or not Mr. Sohigian was out of town, and whether or not Ekzoozian had told the Mosesians that Machoian had been an inefficient worker under Mr. Sohigian (R. 236-237, 240-245).[3] Ekzoozian further testified that Louise Mosesian had never spoken to the employees about the Union or about Mr. Sohigian (R. 235-236, 240-242).

Krikorian testified to an incident in a box car between the middle of January and the end of February, 1949, in which Louise Mosesian asked the men if they were Union members, said she would find out, asked if Mrs. Mosesian had not always kept men working in the warehouse, and said that Mrs. Mosesian could always shut or rent the warehouse (R. 253-

[3]This incident was the incident referred to in the Statement of Facts as the second box car incident.

255).[4] Krikorian testified that he had never heard Louise Mosesian mention Mr. Sohigian's name, but that he had heard Ekzoozian and Machoian discussing Sohigian. He testified that he heard them arguing in a box car, on an occasion before or after that just mentioned, and apparently that Machoian accused Ekzoozian of telling the Mosesians that Machoian had been discharged by Mr. Sohigian for Union activities.[3] Krikorian was unable to understand this argument fully, inasmuch as it occurred in fluent Armenian and he did not understand it that well (R. 255). Krikorian testified that after this argument he saw Ekzoozian go in the direction of the warehouse office, but that he did not know whether Ekzoozian actually went there or talked to any of Respondent's officers. Krikorian testified that later in the day he asked Louise Mosesian if she was going to fire Machoian and that she answered, "No, he is a good worker." (R. 260-261.)

The testimony of Mrs. Mosesian, Louise Mosesian and Mary Mosesian on the subject of Machoian's discharge is devoted, for the most part, to establishing Respondent's defense, which will be discussed hereinafter. With respect to the affirmative elements of the Board's case, Louise Mosesian testified that on the occasion of Mr. Sohigian's visit about the end of 1948, when Machoian was discussed, nothing was said about Machoian's Union activities (R. 138); that

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[4]This incident was the so-called first box car incident.

she had never discussed the Union or Union activities with Machoian at any time (R. 175); that she did not know that Machoian was interested in the Union during the time he was employed or that he was carrying on any Union activities, and further that she did not try to find out (R. 176-177). She testified with respect to the box car incidents that on an occasion right after lunch on a day in January, 1949, she heard a big argument going on, went into a box car, and told the men to get to work (R. 171-175). When asked whether Mrs. Mosesian would listen to employee Ekzoozian if he recommended that someone was not doing his job, she testified that Mrs. Mosesian would not take such a recommendation into account (R. 207). Mary Mosesian testified that the only time she had ever discussed the Union with Machoian or anyone else was on the day of the election or the day before, when she told the men that "Today is election day in the afternoon. Yes was in favor of the Union, No was in favor of the warehouse, non-union. They could vote as they pleased, as they saw fit" (R. 208). This testimony was corroborated by that of Ekzoozian (R. 233). Mrs. Mosesian testified that she never talked to anyone about the Union, or about the warehousemen joining the Union because she at no time knew that they were or were not members of the Union (R. 271-272).

The foregoing summary sets forth every shred of evidence contained in the record that bears in any way upon the discriminatory discharge of Machoian, other than testimony relevant to Respondent's affirm-

ative defenses. Plainly, the only testimony on which the Board could rely to establish the vital fact of knowledge in Respondent that Machoian was in the Union was Machoian's own testimony as to Louise Mosesian's accusation in the box car on the occasion of the "second" box car incident (R. 81, 113), and Sohigian's testimony that, on a certain occasion some time after that of his first visit with the Mosesians, he discussed Machoian's Union activities with the Mosesians (R. 149-152). Krikorian never gave any testimony which showed belief on the part of Respondent that Machoian organized the warehouse. The most Krikorian testified to was a threat by employee Ekzoozian followed the same day by Louise Mosesian's statement that Machoian would not be fired!

The testimony of Machoian that Louise accused him of organizing the warehouse must be disregarded, if the Trial Examiner's judgment as to the credibility of witnesses is to be given any weight. The Trial Examiner had a low opinion of Machoian's credibility (R. 19). With respect specifically to the second box car incident, when the accusation was supposed to have been made, the Examiner believed Krikorian's testimony that Louise Mosesian never came to the box car at all on that occasion, and therefore necessarily concluded that she never accused Machoian of organizing the Union (R. 22). Indeed, as pointed out above in the Statement of Facts, footnote 2, the second box car incident occurred early in January or even before the end of 1948, just after

Mr. Sohigian's first visit at the Mosesians and before any of Respondent's employees had even become interested in the Union.

Mr. Sohigian's testimony boils down merely to a statement that at some time or other he discussed Machoian's Union activities with Louise Mosesian. He was unable to say whether this discussian occurred before or after the Union election at Respondent's warehouse, whether it occurred before or after some conversation concerning the election, when the conversation concerning the election took place, or whether the election had ever taken place.

The entire record, then, can be searched in vain for anything to support the statement of the Board in its Decision and Order that "the credited testimony of Krikorian and Sohigian established that the Respondent's officials believed that Machoian was responsible for bringing the Union into the warehouse" (R. 66). The affirmative evidence relied upon by the Board to establish discriminatory discharge even fails to establish that Respondent's officers ever had any idea before his discharge that Machoian was a member of the Union. Respondent, of course, was aware of Union activities inasmuch as a representation election took place during the period of Machoian's employment, and there was some testimony that Louise Mosesian asked the men who were Union members and said that she was going to find out. Is this enough to establish knowledge in Respondent that Machoian was a Union member? Is this enough

to establish a discriminatory discharge? The answer to these questions must be No. As has been pointed out, under the Act as it stood prior to 1947, to establish discriminatory discharges, it was insufficient merely to show anti-Union animus and that Union members were discharged.[5] No testimony connected any such animus with Machoian's discharge, even circumstantially. The Board did not carry its burden of proof of discriminatory discharge.

Respondent submits that under the rule for review announced in *Universal Camera Corp. v. N.L.R.B.*, ... U.S. ....., 71 S. Ct. 456 (1951), the record before this Court "clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses, or its informed judgment on matters within its special competence, or both." The only testimony in support of the decision is that of two witnesses, Machoian and Sohigian, the first of whom was impeached (R. 116) and the second of whom was not shown ever to have told the Mosesians that Machoian brought the Union into his place of business or into Respondent's warehouse (R. 151). Affirmative evidence of a discriminatory discharge is totally lacking from this record.

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[5]Respondent will discuss fully in the next section of this Argument, which deals with interference, restraint and coercion, the alleged acts relied on to show the animus. It is there demonstrated that these acts probably did not occur, that if they did occur they occurred about January 15, 1949, three months before Machoian's discharge, and that if they occurred they were not unfair labor practices.

B. RESPONDENT DISCHARGED MACHOIAN BECAUSE HE SMOKED WHILE AT WORK IN RESPONDENT'S WAREHOUSE DESPITE WARNINGS TO DESIST, AND BECAUSE HE SANG AND DANCED DURING WORKING HOURS.

Since the Board did not sustain its burden of proof of discriminatory discharge, the burden of coming forward with a defense never passed to Respondent. But, if the burden of coming forward had passed to Respondent, Respondent would have sustained it, since the testimony overwhelmingly demonstrates that Machoian was discharged for cause.

In order to show that Machoian's smoking was a cause for his discharge, the record must show (a) that Respondent had and enforced a rule against smoking, (b) that Machoian knew of this rule, (c) that he violated the rule, and (d) that the violations caused his discharge. Perusal of the Summary of Facts set forth above in this Brief and of the citations there made to the record to supporting and contradictory testimony demonstrates each of these facts. The Trial Examiner, however, found that Respondent had no rule against smoking (R. 26-27), that if there was such a rule it was disregarded with impunity (R. 31), that Machoian was suddenly discharged (R. 31) and that no reason was assigned therefor (R. 29-30). The Board found that Respondent had a rule against smoking, but that "the vast preponderance of the credited testimony" showed that the rule was "rarely enforced" and that this defense was "most unpersuasive" (R. 67). Therefore, we shall here discuss in detail the evidence which shows that Respond-

ent had a rule against smoking which was enforced and for the violation of which Machoian was discharged.

1. Respondent had a rule against smoking inside the warehouse which was enforced.

The record shows that there were stenciled "No Smoking" signs on the pillars of Respondent's warehouse building which were visible to anyone in the warehouse (R. 196). Respondent also maintained other "No Smoking" signs which the employees tore down or defaced from time to time (R. 163-165). The record shows that every employee was warned by Mrs. Mosesian about smoking in the warehouse when hired—except, of course, Machoian (R. 223, 224, 246, 252, cf. R. 88-89). Common sense required such a rule, since inflammables were stored in the warehouse (R. 98-99), and moreover the Mosesians had in 1947 suffered a large fire loss by reason of a cigarette (R. 185).

Was this rule enforced and observed, or was it "consistently and universally disregarded by all of the employees" (R. 31)? The following summaries of the testimony of Respondent's employees and of W. H. Justice shows that the rule was enforced and observed.

Machoian's testimony that Respondent's rule against smoking was "observed very much in the breach thereof" was as follows (R. 87-88):

> Q. Mr. Machoian, did you ever smoke in the warehouse?

A. Well, we smoke on the——

Q. Wait a minute. Who is "we"?

A. All the people.

Mr. Thomas. Answer the question.

Q. (By Mr. Siciliano). Tell me their names. Who are they?

A. Eddie Ejadian.

Mr. Thomas. You asked a specific question, Counsel. Have the witness answer the question.

Trial Examiner Downing. You were asked if you smoked. That was the question.

The Witness. I smoked lots of times on the platform. Everybody smoked.

Mr. Thomas. Answer the question yes or no.

Q. (By Mr. Siciliano). Did you smoke?

A. Yes, sometimes.

Q. Where?

A. On the platform.

Q. Did you ever smoke inside the warehouse?

A. Sometimes we smoked inside.

Trial Examiner Downing. The question is, did you smoke inside?

The Witness. Sometimes.

Q. (By Mr. Siciliano). O.K. I am talking about you, alone, nobody else, just you.

A. Yes, sometimes I smoked inside.

Q. All right. Now did you ever get any complaints, did anybody ever tell you, about your smoking?

A. Not a one of them. They didn't say any complaint. They didn't tell me nothing at all.

Machoian further testified that Krikorian smoked in front of Mrs. Mosesian lots of times (R. 126); that he smoked in front of Louise Mosesian and she didn't

say a word, that he didn't know, that he never heard (R. 126-127); and that he only saw Krikorian smoke in front of Mrs. Mosesian once but that she said nothing (R. 122-128). Machoian testified that he never saw Ejadian smoke in front of either Mrs. Moosesian or Louise Mosesian (R. 127); that "I can't see them all, but I did see they all smoking over there" (R. 127); and that when he and Krikorian smoked in front of Mrs. Mosesian (whether in the warehouse or on the platform outside was not clear) she said nothing (R. 126, 128). He testified at first that when he smoked in front of Mrs. Mosesian he was not in the warehouse, then he said he was in the warehouse or on the platform, and finally, simply, "The warehouse" (R. 128). He testified that Mr. Justice smoked inside (R. 89), that Mr. Justice did not smoke between the stacks (R. 129), and that Mr. Justice did smoke between the stacks (R. 130).

Ejadian, in answer to a question whether he ever saw Mr. Justice smoke in the warehouse said, "Yes" (R. 247). He testified that if he smoked inside the warehouse he would be fired (R. 246).

Ekzoozian testified, in answer to a question as to how many of the men working with him smoked in the warehouse, that "I just see one smoking. That is my partner. Just one." He testified that Machoian was his partner and that Machoian smoked cigarettes (R. 225, 227, 228). Concerning Mr. Justice, Ekzoozian testified, "I always see a pipe in his mouth, but I don't know if he smokes or not," that he did not

know if Justice's pipes were lit, and that he never saw Justice with a cigar or cigarette in his mouth (R. 226).

Krikorian testified that he did not smoke in front of Mrs. Mosesian if he could help it; that she only caught him once and thereupon reprimanded him (R. 252). In answer to the question, "Did you ever see Mose Machoian smoke in the warehouse?" he said, "Yes" (R. 252). In answer to the question, "Did you ever see Mr. Justice smoke * * * in the warehouse," Krikorian said, "Yes" (R. 256). In answer to the question whether he ever saw Mrs. Mosesian smoke in the warehouse, he answered, "Yes" (R. 256). With respect to the ordinary warehouse employees, Krikorian testified that he had seen them smoking in the warehouse (R. 256), but that they did not smoke before any of the Mosesians but smoked behind their backs (R. 262).

W. H. Justice testified that he smoked in the warehouse and in the aisleways, but that he never smoked between the stacks of goods (R. 264); that his pipe was "usually unlit" when he went into the warehouse and that he had his cigar in his mouth in the warehouse "more times unlit than lit" (R. 265). He testified that he cautioned the regular warehousemen not to smoke in the warehouse (R. 264) and that he cautioned itinerant help not to smoke in the warehouse (R. 266). He testified that he did not hire and fire warehousemen (R. 262) and that it would be up to the Mosesians to tell the men whether or not they should smoke in the warehouse (R. 266).

The foregoing summarizes all of the testimony other than that of Respondent's officers,[6] which bears upon the question whether or not the no-smoking rule was enforced. How can it be said that the rule was observed "very much in the breach thereof?" Krikorian testified that the men did not smoke in front of the Mosesians. Ekzoozian's testimony and Ejadian's testimony either do not bear on the issue of whether the employees were permitted to smoke or show that the employees did not smoke inside the warehouse. Even Machoian testified only with reluctance that the men smoked inside the warehouse "sometimes," and again with reluctance that he had smoked inside the warehouse in front of Mrs. Mosesian—and his testimony is said by the Trial Examiner not to be worthy of belief when contradicted by Krikorian's testimony.

The record actually shows that the only warehouseman who smoked in front of the Mosesians was Machoian. The only other warehouse employee who smoked inside the warehouse was Krikorian, who was only caught once and was thereupon reprimanded. W. H. Justice, the general operating manager, did smoke sometimes inside the warehouse. His pipes or cigars were unlit more often than lit and he was careful not to smoke between the stacks of goods. He assisted the Mosesians in preventing smoking among the men in the warehouse. The greater part of

[6]The testimony of Respondent's officers concerning the rule against smoking is concerned mainly with establishing the existence of "No Smoking" signs inside the warehouse and with reprimands to and the discharge of Machoian.

Mr. Justice's work was done in the warehouse office (R. 199) where Mrs. Mosesian herself would smoke (R. 189). There was testimony that Mrs. Mosesian had smoked in the warehouse. Louise Mosesian testified that her mother smoked only occasionally (R. 188) and that she never saw her smoke in the warehouse (R. 188). If Mrs. Mosesian did so, it was not often and in any event would not be relevant to the question whether or not the rule against smoking was enforced with respect to the employees.

When the foregoing testimony is considered as a whole, along with the uncontradicted testimony of Mary Mosesian that one Mirikian had been discharged for smoking shortly before Machoian came to work (R. 217), it is clear that Respondent's rule against smoking was known to the men and obeyed by them, except when they thought they could smoke without being observed. The statement that Respondent's rule was observed in the breach thereof finds no support in the record.

2. Machoian knew of Respondent's rule against smoking, was repeatedly reprimanded for his persistent violations, and was finally discharged because of his disregard of the rule.

The circumstances surrounding the hiring and discharge of Machoian have also been covered previously in the Summary of Facts. Three witnesses testified that Machoian was warned about smoking when he was hired (R. 165-167, 227, 269), as were the other employees when they were hired.

Louise Mosesian testified that she reprimanded Machoian for smoking because she feared that fire

would result and reported his smoking to Mrs. Mosesian (R. 192-196, 197-199). Machoian insisted that he was never reprimanded (R. 88). In this situation it is necessary to decide whom to believe of two interested witnesses: Machoian, who was impeached (R. 116) and whose testimony was contradicted by that of Ekzoozian (R. 227), his good friend (R. 226, 237, 241) or Louise Mosesian, whose testimony that she reprimanded Machoian for smoking and reported the incident to Mrs. Mosesian (R. 192-196) was never impeached or contradicted by anyone besides Machoian. Mrs. Mosesian also testified that she reprimanded Machoian for smoking (R. 269). Respondent submits that if Krikorian was reprimanded when he was caught smoking (R. 252), Machoian would according to common sense also have been reprimanded, and that the testimony of Louise Mosesian, Ekzoozian, and Mrs. Mosesian must be preferred to the reluctant testimony of Machoian, whom the Trial Examiner thought so untrustworthy.

With respect to Machoian's discharge, four witnesses testified that Mrs. Mosesian found Machoian smoking twice, once in the morning and once in the afternoon, on April 12, 1949, and that she reprimanded him; that she told her office girl, Violet Misikian, to have Machoian come into the office at the end of the day; and that when he did not do so she went out to the platform as he was leaving and told him he was discharged (R. 211-216, 218-219, 220-223, 228-232, 269-271). Mrs. Mosesian's testimony that the discharge was effected for smoking is corroborated

by Mary Mosesian (R. 212), Misikian (R. 221) and Ekzoozian (R. 228). Machoian testified merely that Mrs. Mosesian discharged him without explanation (R. 87, 104-107). Machoian testified that he thought "they fire me because I work for the Union," but that Mrs. Mosesian didn't tell him that (R. 107). Ekzoozian testified that Machoian told him that Mrs. Mosesian told Machoian not to come down to work anymore (R. 231-232).

The evidence that Machoian knew of no rule, was not reprimanded, and was suddenly discharged with no reason given is, then, merely Machoian's testimony—which the Trial Examiner chose not to believe when contradicted by that of Krikorian (R. 18). With respect to this issue again, this Court "cannot conscientiously find that the evidence supporting [the] decision is substantial, when viewed in the light that the record in its entirety furnishes." *Universal Camera Corp. v. N.L.R.B.,* supra.

It is not significant on this point that Louise, after the second box car incident, told Krikorian that Machoian was a good worker and that she would not fire him. (R. 261.) If as already pointed out this instance occurred around January 1, 1949, it has little to do with Machoian's discharge on April 12, 1949, since most of the reprimands for smoking must have occurred thereafter. If, on the other hand, the second box car incident took place some time in February, 1949, or thereafter, then Louise's statement that Machoian was a good worker would go far to show that at a time when Respondent was supposed to know

that Union activities were taking place and that Machoian was in them, Respondent did not intend to discharge Machoian, and therefore that Respondent must have changed its mind about Machoian later for reasons unrelated to his Union activities.

3. A cumulative and contributing cause of the discharge by Respondent of Moses Machoian was his repeated singing and dancing in Respondent's warehouse during working hours.

The facts with reference to this cause of Machoian's discharge have been well covered above in the Summary of Facts. Nevertheless, the relevant testimony will be here summarized in order to demonstrate that substantial evidence on the record considered as a whole does not show that this "belated attempt * * * is, if anything, less persuasive than its attempt to rely on the 'no smoking rule' " (p. 16 of the Board's brief) but on the contrary shows that the defense is complete and sufficient in itself.

Louise Mosesian testified that shortly after Machoian began working for Respondent she heard a voice singing very loudly in the Turkish language, that she went out into the warehouse and saw Machoian snapping his fingers and jumping around, and that she reprimanded Machoian (R. 167-169). She testified that Machoian sang and danced several times thereafter and that she reprimanded him (R. 169-170). She reported the incidents to Mrs. Mosesian (R. 169-170).

Machoian admitted that he sang in the warehouse, and in answer to the question, "How loud?" said "Well, not loud anyway" (R. 90).

Ekzoozian testified that Louise Mosesian talked to Machoian about his singing or dancing and that she said, "This is not a dancing room. You come down here for work, not for dancing" (R. 232).

Krikorian testified that he had seen Machoian sing or dance in the warehouse during working hours, although the singing had not bothered him and he would not be a judge of whether or not Machoian sang louder than he, Krikorian, sang; and also that Louise Mosesian had reprimanded him for such singing (R. 252, 258-259).

No other witness testified as to whether Machoian sang or danced at work. It is therefore clear, as the Board is compelled in its brief to admit (page 8), that Machoian did "wax exuberant at work," and it is clear that Machoian's "exuberance" provoked reprimands from his employer and that Mrs. Mosesian was made well aware of Machoian's misconduct.

The Board nevertheless says in its brief (page 8) that Machoian "was never disciplined or threatened with discharge for such conduct." The only citations given for this statement are to the Intermediate Report (R. 32-33) which, so far as we know, is not evidence in the case, and to Machoian's own testimony (R. 130-132). The citation to the Intermediate Report does not help the Board; the Trial Examiner himself found that Louise Mosesian did reprimand Machoian more than once for his "exuberance" (R. 32). The Board, in its brief, brushes aside this finding and evidently accepts Machoian's testimony, although it is

directly contradicted by that of his friend, Ekzoozian (R. 232), and although Machoian was an interested and unreliable witness. True, Machoian may never have been explicitly threatened with discharge for singing and dancing. What must be done in a very small business to "discipline" an employee? Surely the threat of discharge is implied in repeated reprimands, or would be to any person reasonably endowed with common sense.

The Board also claims (p. 8) that the latest occasion upon which Machoian's "exuberance" bothered Louise was several months before his discharge, but the testimony to which the Board refers (R. 167-169) in support of this proposition, shows that the first such occasion was in December, 1948 (R. 167); that "several times after that he bursted forth * * *" and that one such other occasion occurred around the first of the year (R. 169). How, on the basis of this testimony, or any other in the record, can any statement at all be made as to when was the latest occasion upon which Machoian's exuberance annoyed Louise?

The Board says that in any event this defense is irrelevant, since Louise had nothing to do with Machoian's discharge (p. 8). It is far from clear that she had nothing to do with Machoian's discharge. She reported these infractions of discipline to her mother (R. 170, 197-198) who eventually discharged Machoian.

Thus, respondent clearly established, upon evidence believed by the Trial Examiner, that Machoian sang

and danced at work and that Respondent objected to such conduct. The Board nevertheless says in its brief "Indeed, the very manner in which the defense is asserted further supports the Board's findings of discrimination. Inconsistency in explaining the reason for a discharge has long been regarded as a legitimate factor on which to base an inference that the true reason for the discharge is being concealed" (p. 16). Where is the inconsistency? Singing and dancing were pleaded as cumulative causes. Not every employee who is discharged for cause is discharged for one cause only or for an immediate cause only. Respondent is also unable to perceive why it should be accused of asserting the defense in such a manner as to support a finding of discrimination. Respondent amended its pleading in accordance with permission granted by the Trial Examiner (R. 116-117) after the Board's counsel first raised the issue (R. 90). Respondent protests against this accusation in the Board's brief, which finds no basis whatever in the record.

The foregoing discussion establishes the following facts with respect to the record in this case. First, the only conceivable affirmative evidence of discriminatory discharge is circumstantial evidence of anti-Union animus which was not connected in any way with Machoian's discharge since it was never shown that Respondent's officers believed that Machoian was a Union member, let alone a Union organizer. With respect to whether or not such an animus existed, it must be noted that the first box car incident, the oc-

casion on which Louise Mosesian made the statements to the men which supposedly demonstrated anti-Union animus, was placed by Krikorian as having occurred perhaps as early as January 15, 1949 (R. 253). It was also placed by both Krikorian (R. 255) and Machoian (R. 82) within a few days of the second box car incident, which as above shown (footnote 2, pp. 7-8) must have occurred early in January, 1949. Thereafter, Respondent told the men to vote as they pleased. (R. 123-124, 208, 233). Therefore, the so-called anti-Union animus was in all probability shown, if at all, three months before Machoian's discharge and shown by Louise Mosesian. The anti-Union animus was connected with Machoian's discharge by Mrs. Mosesian just as closely as, and no more closely than, Machoian's singing and dancing.

The second fact demonstrated by the record is that Respondent had a rule against smoking inside the warehouse of which all the employees were aware, which was enforced whenever infractions were noted, and which had resulted in the discharge of a previous employee. The third fact established is that Machoian violated this rule against smoking repeatedly, and the preponderance of the evidence shows that he was reprimanded for his violations repeatedly, that Mrs. Mosesian was made aware of them, and that she assigned them as the reason for Machoian's discharge. The fourth fact established is that Machoian indulged in other misconduct during working hours for which he was reprimanded and of which Mrs. Mosesian knew.

Respondent does not contest the argument that where an employee believed to be responsible for organizing is discharged in a setting of Union hostility, an inference is justified that the discharge was discriminatory. Respondent agrees that such an inference may be "inescapable where it also appears that the discharge was precipitate without prior reprimand, warning or discipline" (Board's brief p. 14). However, these principles of law simply have no application to this case. In this case there is no evidence that Respondent believed Machoian to be responsible for organizing the plant or even that Respondent knew Machoian was a Union member. And, in this case the discharge was not precipitate without prior reprimand. It is also said that refusal to give the employee any reason for his discharge shows that the motive may have been discriminatory. However, in this record there is only Machoian's own testimony and the testimony of his friend Ekzoozian as to what Machoian told him concerning Mrs. Mosesian's statements to show that no reason was assigned, and this testimony is contradicted by that of Mrs. Mosesian.

A close parallel to the present case on the discriminatory discharge issue is *Pittsburgh Steamship Co. v. N.L.R.B.,* 180 F. (2d) 731 (C.A. 5th, 1950), affirmed 71 S. Ct. 453 (1951). In this case it was contended that the company had discriminatorily discharged a union organizer. The company contended that the organizer, Shartle, was discharged for incompetency. The employer offered testimony of its supervisors, who were licensed officers on one of its Great Lakes merchant vessels, that Shartle was un-

familiar with some of his work, that he was careless and that sometimes he returned to his ship late without explanation. Specifically, evidence was offered that Shartle was supposed to handle a winch which could injure men if not carefully tended. There was testimony that Shartle had, on an occasion, operated the winch negligently. Although no one had ever been discharged for so doing, there was uncontradicted testimony that another man had been demoted for such negligence with loss of pay. Shartle denied that he had been negligent. One of the ship's officers testified that Shartle was lazy, that his partner would do three-fourths of the work and that he reprimanded Shartle. Shartle was discharged by the first officer of the ship, who had the exclusive power to discharge men. The Examiner held that the incompetence shown was unsubstantial. The Examiner found that the isolated mistakes in the operation of the winch and Shartle's unfamiliarity with the technique in rarely required work did reflect a certain lack of experience and skill and that it might be assumed that Shartle fell short in other respects of the degree of skill possessed by old line seamen. The Examiner concluded that Shartle was discharged for Union activity, inasmuch as the incompetence shown was unsubstantial. The Examiner questioned the discharge also on the grounds that the first mate had not consulted the other mate, although the First Mate had asked the Third Mate shortly before the discharge how Shartle had been getting along with his work. No one else involved in the *Pittsburgh Steamship* case claimed to

have been prevented from engaging in Union activities. The Court said: "Reading the case in the light of the whole record, we conclude that Shartle was discharged for cause, and that the finding that he was discharged because of Union activity is not supported by reliable, substantial and probative evidence." 180 F. (2d) 741. The decision of the Court in the *Pittsburgh Steamship* case is squarely applicable to this case. In this case as in that only sporadic occurrences furnish any basis for finding that Respondent had an anti-Union animus. In this case as in that the Examiner and Board relied upon supposed weaknesses in the defense as affirmative evidence of discriminatory discharge.

On the record and on the authority of the *Pittsburgh Steamship* case, supra, it must be held that Respondent discharged Moses Machoian for cause and that the Board's order that Machoian be given back pay should not be enforced.

II. THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD CONSIDERED AS A WHOLE TO SHOW THAT RESPONDENT ENGAGED IN INTERFERENCE, RESTRAINT OR COERCION, BUT ON THE CONTRARY THE RECORD SHOWS THAT RESPONDENT INFORMED ITS EMPLOYEES THAT THEY COULD VOTE IN THE REPRESENTATION ELECTION AS THEY PLEASED.

The Board found interference, restraint and coercion in "the coercive statements and conduct of Louise Mosesian and Twodi Mosesian, involving interrogation into Union activities and threats to close the

warehouse, as set forth in the Intermediate Report" (R. 66).

The Intermediate Report found interference, restraint and coercion, as follows (R. 25):

> Louise Mosesian's inquiries in the box car as to the employees' union membership, her statement that she already knew who had signed and her threat, in the face of their denials, to obtain the information elsewhere; her statement or threat on the same occasion that her mother could always shut down the warehouse or rent it out.
>
> Louise Mosesian's statement to Krikorian relative to his voting against the Union in the election, and her inquiry of him as to how Ejadian would vote.
>
> Mrs. Mosesian's message to Ejadian, delivered through Azidigian, that if the warehouse became Union, she would release those [union] workers and get other.

Three alleged incidents furnish the basis for the above-quoted conclusions. Each of these has already been mentioned in the Summary of Facts in this Brief, but the testimony concerning the incidents will here be reviewed in detail in order to demonstrate the shaky foundation for the conclusion of the Trial Examiner and Board.

The first such incident occurred on a date uncertainly fixed by Machoian as being about the middle of February (R. 77, 78, 79, 110) and by Krikorian as being between January 15th and the first of March (R. 253) and a few days before or after the second

box car incident (R. 255). According to the testimony of Krikorian, Louise Mosesian came into a box car in which all the men were working and asked if any of the boys had spoken to anybody. To this the employees answered, No. Then she asked, whether any of them had joined the Union, and each said, No. She said that she knew who had signed but they didn't have to tell her, she would find out anyway. She then asked Ekzoozian whether Mama had always kept four or five men working in the warehouse, even in tough times, and Harry said, Yes. Krikorian then testified as follows:

> "And then she said something about 'Mama could always shut it, the warehouse.' and I don't know how that came about, because I haven't asked."
>
> Q. You say "because you haven't asked."
> A. Because I have been through it already.
> Q. What do you mean?
> A. With Mr. Bamford.

Krikorian testified that nothing else was said at that time. (R. 253-254, 259). This incident, according to Krikorian, took ten minutes.

Machoian's testimony as to this incident was similar (R. 77-80). He testified, in addition, that Louise said, "If you fellows vote for the Union, well, you know what is going to happen. We don't want Unions in this." Employee Ekzoozian testified that the only time Louise ever came into the box cars she merely told the men to hurry in their work (R. 234-235). Ejadian did not testify with respect to the incident.

Louise Mosesian denied that it had occurred (R. 170-174).

The Trial Examiner found that the incident occurred substantially as testified to by Krikorian, shortly after February 10, 1949 (R. 19-20). Since the second box car incident occurred about January 1, 1949, this incident must actually have occurred very early in January, 1949. The Trial Examiner in fixing the date of the first box car incident must have relied on Machoian's testimony (R. 77) suggesting that the Mosesians had just prior to the incident received a letter from the Union. But Krikorian testified (R. 255) that on this occasion Louise did not mention any letter from the Board. According to the Trial Examiner (R. 18), Machoian's testimony should be disregarded; since Respondent never received a letter from the Union (R. 17, 19), but only from the Board, Machoian must have referred to the Board's letter.

Louise's remarks on this occasion boil down to the following:

(a) She asked the men which were Union members;

(b) She asked Ekzoozian if Mrs. Mosesian had not always kept men on in the warehouse; and

(c) She may have said something to the effect that Mrs. Mosesian had, during these tough times, been able to shut the warehouse or rent it out or that she could do so, it being evident that Krikorian was confused as to this last statement by Louise Mosesian.

The second alleged incident was testified to only by Krikorian. According to him, he met Louise Mosesian in the warehouse some time before the election, and she said, "I know you will vote against the Union, but how about Eddie?" (R. 261).

These are the only incidents which are clearly placed as having occurred prior to the election. This evidence at most sustains a conclusion that Respondent wished to discover whether or not there was sufficient interest in the men in a Union to justify an election, or whether Respondent should at once recognize the Union without holding an election. Louise also may have made an appeal, not couched in any threatening terms, to the men to consider whether their working conditions had not always been good previously. More than this cannot be extracted from this testimony as to one brief incident which occurred at least one month and probably two months before the election and two or three months before Machoian's discharge. On the election date, or one day previously, the men were told they were to vote just as they pleased (R. 208, 233).

The other incident relied on is a message which Mrs. Mosesian is supposed to have sent to employee Ejadian. Ejadian's mother-in-law, Agnes Azidigian, worked as housekeeper for Mrs. Mosesian. Ejadian testified that his mother-in-law told him that Mrs. Mosesian had said to Mrs. Azidigian that if he ever joined the union, she would fire him (R. 155). He first said this occurred after the election, then that it occurred before the election. In an effort to improve

Ejadian's testimony on this point, General Counsel showed Ejadian a paper written by one Mrs. Phoenix (R. 158). He was asked if the paper helped refresh his recollection as to what his mother-in-law told him. Ejadian answered, "I think so now, because it has been so long I forget" (R. 158). He later testified, when again asked about the contents of the message Mrs. Mosesian was supposed to have given his mother-in-law, as follows (R. 159-160):

> A. She told my mother-in-law if I joined the Union she was going to——
>
> Trial Examiner Downing: She was going to what?
>
> The Witness: You got me puzzled.
>
> Q. (By Mr. Siciliano): Well can you remember? What did she tell you?
>
> A. I think she said if we joined the Union, she was going to get better men.
>
> Q. She said nothing else?
>
> A. That is all she told me.
>
> Q. Is that what you said yesterday, Eddie?
>
> A. I don't remember, maybe I did, maybe I didn't.
>
> Q. But you remember what you said yesterday?
>
> Trial Examiner Downing: He has already testified to that.
>
> Mr. Siciliano: Mr. Examiner, we are just trying——
>
> Trial Examiner Downing: He was asked on Cross-Examination if he remembered what he said yesterday, and he said "No."

It is at once apparent that little can be made of this testimony. Ejadian could not remember from one

day to the next what he had testified to (R. 160), nor could he remember the statement which Mrs. Phoenix had prepared for him.

Mrs. Azidigian was also called as a witness. She testified that Mrs. Mosesian one day told her that "If Eddie belonged to Union, she don't keep him—like these workers, better workers" (R. 180). She testified that she told Ejadian about this, not the same day, but, "Later. Pretty late I told him" (R. 181). She could not remember how much later. She fixed the date of her conversation with Mrs. Mosesian as having taken place in May or June of 1949 (R. 183) and she testified that Mrs. Mosesian did not say that if Eddie joined the Union he would lose his job (R. 184).

Thus, Respondent is held to have committed unfair labor practices on the basis of contradictory and obscure testimony concerning three isolated brief incidents which occurred many months apart in time. Respondent's officers denied making the statements involved, but the Trial Examiner and the Board preferred to believe the testimony of others. This contradicted testimony, when considered along with the uncontradicted testimony that the men were told that they could vote as they pleased—this testimony, which even if believed, does not show an intent to fire anyone for Union membership or to discourage Union membership—is far from establishing interference, restraint or coercion. Nor does it establish the "anti-Union animus" relied on to show that Respondent discriminatorily discharged Machoian. And the state-

ments of Louise Mosesian, if made at all, must have been made around January 15, 1949. When Respondent learned an election would be necessary Respondent permitted it to take place without opposition and explicitly instructed the employees to vote as they pleased. How can it honestly be said that Respondent interfered with, coerced and restrained its employees? How can it be said that these isolated incidents demonstrate Respondent's determination to prevent organization and thereby support a finding that Machoian was discriminatorily discharged?

On page 11 of its Brief, the Board cites cases as authorities that Respondent violated Section 8(a)(1) when Louise Mosesian asked the warehouse workers whether or not they were Union members. On page 12 the Board cites cases as authority that Louise's "thinly veiled threat"—which was ambiguous at best and which may never have been made—constituted interference, restraint and coercion. It is true that something of the sort occurred in each of these cases—along with many other acts. In *H. J. Heinz Co. v. N.L.R.B.,* 311 U.S. 514, 61 S.Ct. 320 (1941), the company's superintendent and various foremen reprimanded employees for attending union meetings, threatened one with discharge if he joined the union, called employee meetings at which they spoke disparagingly of the union, campaigned for a company union, and questioned employees concerning their labor union sympathies. In *N.L.R.B. v. Bradford Dyeing Association,* 310 U.S. 318, 60 S.Ct. 918 (1940), there were discriminatory discharges proved on inde-

pendent evidence and efforts to set up a company union in addition to the questioning. In *N.L.R.B. v. Holtville Ice & Cold Storage Company,* 148 F. (2d) 168 (C.C.A. 9th, 1945), there was an effort by the employer to have an independent investigation of union activity, there was urging of several employees to back out of the union, there were statements that unions would not be permitted in the area, there were proposals to form an independent union, plus a refusal to bargain with men who stated that they were duly elected representatives of the employees. In *N.L.R.B. v. J. G. Boswell Co.,* 136 F. (2d) 585 (C.C.A. 9th, 1943), there were statements that the employer would never tolerate or recognize the Union, advice that employees should seek employment elsewhere if they wished to join a Union, warnings that Union members would not be reemployed at the termination of approaching seasonal lay-off periods, threats to lock up the plant, and refusal to permit the posting of a notice that the company would not discriminate against employees who wished to join a Union. Each of the other cases cited by the Board involved a whole series of different acts establishing with certainty that the employer gave the men to understand that they would lose their jobs if they joined or worked for the Union. In these cases the questioning was one of many elements and the threat to shut down was explicit and accompanied by other acts. In some it was not even contended that no unfair labor practices had been committed, *N.L.R.B. v. Long Lake Lumber Co.,* 138 F. (2d) 363 (C.C.A. 9th, 1943);

N.L.R.B. v. Fruehauf Trailer Co., 301 U.S. 49, 57 S.Ct. 642 (1937). Thus, these cases are no authority at all that Louise Mosesian's alleged questions or statements constituted coercion or restraint. Nowhere can a case be found in which it is held that the employer was guilty of interference, restraint or coercion on the basis of three isolated incidents which may not have occurred at all, which involved no statement that any individual would be discharged if the employees joined the Union, and which involved no statement that if the men joined the Union the plant would be shut down.

III. RESPONDENT DID NOT RECEIVE A FAIR HEARING BECAUSE OF THE BIAS OF THE TRIAL EXAMINER AND OF THE BOARD, AS CLEARLY SHOWN BY THE DISTORTIONS OF EVIDENCE RELIED ON TO SUSTAIN THEIR CONCLUSIONS AND FINDINGS AND BY THEIR CONSISTENT DISBELIEF OF RESPONDENT'S OFFICERS ON CRITICAL ISSUES.

A. THE INTERMEDIATE REPORT AND RECOMMENDED ORDER EXHIBITS BIAS.

The Intermediate Report is replete with indications of the Trial Examiner's bias. This bias is shown in two ways: first, in the choice by the Trial Examiner of which witnesses he chose to believe, and second, in his distortions of the testimony he did believe. Those parts of the Intermediate Report which demonstrate his bias will be covered here in the order of their appearance in the Report.

(1) The Trial Examiner found that about February 10, 1949, Louise Mosesian came into a box car and

made the statements already referred to concerning whether or not Mrs. Mosesian had not always kept four or five men working in the warehouse, and that she could always shut it or rent it out (R. 19-20). The Trial Examiner based this finding upon the testimony of Krikorian and Machoian (R. 77-80, 114-116, 252-255, 259). He disregarded the testimony of Louise Mosesian, that the statements were never made (R. 171-175). True, as an officer of Respondent, she was interested in the outcome of the case but the witnesses who were believed are also interested. Krikorian, as the record shows, was actually the leader in Union organization; Machoian has a pecuniary interest in the outcome of this case, and further was impeached (R. 116). Louise Mosesian's testimony was corroborated by that of Ekzoozian (R. 234-236, 240-242). The Trial Examiner states (R. 18-19) that in reconciling the testimony he made a due appraisal of the "social relationship existing between Ekzoozian and the Mosesians." He was evidently unwilling, however, to make a due appraisal of the social relationship between Ekzoozian and Machoian (R. 226, 237, 241).

(2) The Trial Examiner believed Krikorian's testimony (R. 22) that Krikorian asked Louise Mosesian if she were going to fire Machoian and that she replied "No, he is a good worker." He refused to believe Louise Mosesian's denial that she had ever discussed Machoian with Krikorian. It is not the duty of the hearing officer in resolving conflicts in testimony always to believe the testimony of witnesses favorable

to one side, and to discredit the testimony favorable to the other side.

(3) The Trial Examiner (R. 22) found that Sohigian's "admission" established that Sohigian and the Mosesians had discussed Machoian and his Union activities before the election. But the truth of the matter is that the record shows that Sohigian testified in substance that such discussions could have taken place any time between the end of 1948 and the date of the hearing (R. 148-152). Why should the Trial Examiner make untrue statements in his Intermediate Report concerning the effect of testimony unless he was determined to decide the case against Respondent and was simply attempting to find some ostensible support for his holding?

(4) With respect to Louise Mosesian's alleged questioning of Krikorian as to how Ejadian would vote in the election, the Trial Examiner again chooses (R. 23) to believe the interested witness (Krikorian) whose testimony might support the finding of an unfair labor practice and to disbelieve Respondent's officer (Louise Mosesian), whose testimony goes the other way.

(5) Another indication of bias appears with respect to the Trial Examiner's conclusions concerning the alleged message from Mrs. Mosesian to Ejadian (R. 23). First, again, he chooses to disbelieve the testimony of Respondent's officer, Mrs. Mosesian (R. 272) that no such message was given, and to believe the confused testimony (R. 155-161, 179-184) which supports

the result he desires to reach. Second, he says (R. 23) that "Mrs. Azidigian became quite confused as to the time of the occurrence of the incident, but Ejadian's testimony fixes it definitely as having occurred before the election." How can the Examiner in good conscience make such a statement in his report concerning the evidence? Mrs. Azidigian said she was "pretty sure" that the incident occurred in May or June of 1949 and she fixed it by a date which she would be certain to remember—the graduation of her boy from high school (R. 183). Mrs. Azidigian was not "quite confused." She knew just when the incident occurred. Ejadian testified (R. 155) that the incident occurred before the election and that it occurred after the election. Evidently he was the confused witness, especially in view of his later testimony (R. 160) that he could not remember what he had testified to the day before when he was attempting to place the incident in time.

(6) The Intermediate Report also shows bias in its treatment of the events surrounding Machoian's discharge on April 12, 1949 (R. 25-26, 29-30). The Trial Examiner states that Ekzoozian's testimony (R. 228-232) corroborating that of Mrs. Mosesian with respect to her having caught Machoian smoking twice on that date was "extremely confused and contradictory as to details." On the contrary, however, his testimony was clear as to details. He testified that on that date Machoian smoked once in the morning and once in the afternoon, and that Mrs. Mosesian caught him each time (R. 228-230). Further, in discussing this inci-

dent the Trial Examiner blandly omits to refer to the corroborating testimony of employee Violet Misikian (R. 220-223), of Mary Mosesian (R. 217-219) and of Mrs. Mosesian (R. 269-271). The Trial Examiner merely says (R. 30) that he does not credit Mrs. Mosesian's testimony that she caught Machoian smoking twice on the day of the discharge.

The Trial Examiner finds (R. 29) that Mrs. Mosesian did not assign any reason for Machoian's discharge by believing Machoian's testimony (R. 87) and disbelieving Mrs. Mosesian's (R. 271). The Trial Examiner claimed (R. 30) that Machoian's testimony in this respect was corroborated by that of Ekzoozian and Violet Misikian. But Ekzoozian testified merely that Machoian had said to him that Mrs. Mosesian said "don't come down to work tomorrow" (R. 231-232). Ekzoozian did not know then what Mrs. Mosesian said—he merely knew what Machoian told him and Violet Misikian testified that she did not know what Mrs. Mosesian said to Machoian (R. 222).

(7) The discussion of the Trial Examiner (R. 26-29) concerning Respondent's rule against smoking contains shocking examples of distortion of the record and of relience upon matters not in evidence. First, no testimony of W. H. Justice showed that Mrs. Mosesian's cautions against smoking "were generally understood to apply only to portions of the warehouse where the more inflammable materials were stored" (R. 27). Justice testified simply that he cautioned the regular warehousemen not to smoke in the ware-

house, that he smoked in the warehouse occasionally himself, although not between the stacks, and that his pipe or cigar were more often unlit than lit (R. 264-265). What bearing can this testimony possibly have on the content of Mrs. Mosesian's instructions to the employees concerning smoking? Next, the Examiner says (R. 271) Respondent's stencilled "No Smoking" signs were small, approximately one inch high and of "ancient origin," despite his own statement (R. 196) that he visited the warehouse and saw "No Smoking" signs stencilled on the pillars of the warehouse which "were visible to anyone." Why this innuendo?

The next example of his bias is the Trial Examiner's statement (R. 27) that Louise had been "unable to recall when interviewed by a field examiner several months before the hearing whether they [the signs] were actually on the pillars at the time of the interview or during the period of Machoian's employment." The record contains no support whatever for this statement.

The Trial Examiner next stated (R. 28) that the testimony of Respondent that cardboard "no smoking" signs were put up during Machoian's employment but were defaced or torn down from time to time was contradicted by the testimony of Ejadian. But in fact, Ejadian was confronted with a prior statement in which he had said that "for the first time there were about five or six paper signs in the warehouse, saying, 'No Smoking'" (R. 248), with respect to which statement he said, "I just remember that I had

signed it" and that that was all that he remembered about it (R. 250-251). Ejadian's testimony clearly amounted not to a contradiction but to a zero. And, Justice and Krikorian did not contradict testimony of Respondent's witnesses concerning the cardboard signs, inasmuch as they were never asked about them.

The Trial Examiner also states that "occasional cautions or reprimands from the Mosesians were shrugged off and openly disobeyed" (R. 28). We have already covered this ground thoroughly in this brief. Examination of the record shows that only Machoian "shrugged off and openly disobeyed" Respondent's rule against smoking and that Machoian was discharged because he did so.

The Trial Examiner then discusses W. H. Justice. He says (R. 28) that "Justice frankly admitted smoking in the warehouse and customarily went about with a pipe or cigar in his mouth before the other employees," and that the testimony of the Mosesians and Ekzoozian that Justice's pipe and cigar were unlit is "not credited in view of Justice's own testimony to the contrary." As has always been pointed out in this brief, Justice testified that his cigar and pipe were more often unlit than lit and that he did not smoke between the stacks (R. 264-265). Justice did most of his work in the warehouse office (R. 199). When he went out into the warehouse with his pipe he would carry his hand over the bowl (R. 264-266). Why the use of the phrase, "frankly admitted" or the word "customarily"? Why the suppression of the fact that the pipe or cigar usually was unlit?

The Trial Examiner next states (R. 29) that Krikorian testified that he and the other employees "customarily" smoked in the warehouse. This is a distortion of Krikorian's testimony (R. 262) that the men smoked behind the Mosesians' back and that he did not smoke in front of Mrs. Mosesian if he could help it (R. 252).

Finally, bias is also shown concerning Respondent's no smoking rule in the Trial Examiner's refusal (R. 31) to credit Mary Mosesian's testimony that an employee had been discharged for smoking. He says that the testimony is not corroborated by any witness, and implies that for this reason it is not credited. This is the first time that Respondent has encountered the rule of evidence which says that the uncontradicted testimony of an unimpeached witness is to be or may be disregarded unless corroborated by another witness.

So with respect to Respondent's rule against smoking, the Trial Examiner sought to show its nonexistence by disregard of the record and by misstatements of testimony therein contained.

(8) The Trial Examiner next shows his bias by saying that "the belated pleading at the hearing of additional reasons for the discharge also cast (sic) a dubious shadow upon the bona fides of Respondent's original defense," (R. 32). He seems to think that the time at which a defense is pleaded—pleaded with his own permission (R. 116)—is evidence in the case. If so, this evidence was put in not under oath and without an opportunity of cross-examination, and

should have been disregarded just as hearsay is disregarded. Respondent never objected to this "evidence," but Respondent was never made aware that such "evidence" was in the record.

(9) The next indication of bias in the Intermediate Report is the Examiner's discussion of the purported affirmative evidence in the record that Machoian was discharged because of Union membership and activities (R. 35). He says "Machoian took the lead in the discussions and concerted activities which led to the formation of the Union." The record is opposed in this conclusion (R. 119-121, 153), which even the Board had to reject. With respect to the question whether or not Respondent's officers believed that Machoian was the Union leader, the Examiner said, "Despite the denials by the Mosesians, the record discloses that they were well aware of the part Machoian was playing" (R. 35). He says that this conclusion is established by the testimony of Sohigian that he had discussed Machoian's activities with the Mosesians at their home and by Ekzoozian's later accusation of Machoian as the Union organizer, Ekzoozian's threat to have Machoian fired, and Ekzoozian's departure for the office to carry out his threat (R. 35). We have already covered this ground. Suffice it to repeat that Sohigian's testimony was that he discussed Machoian's Union activities—and he does not say where such activities that were discussed occurred or what was their nature—sometime before the date of the hearing and after the end of 1948 (R. 151). There was irrelevant testimony that Ekzoozian threatened

to have Machoian fired and that after making this threat he departed for Respondent's office (R. 83-84, 260-261). There is no testimony as to why he went to the office, or that he ever said anything to the Mosesians about the incident. In fact, Krikorian's testimony, as already pointed out, indicates either that he said nothing or that if he did, the Mosesians did not care (R. 261). The Trial Examiner recites this distorted version of Ekzoozian's alleged act in order to lend some color to his assertion that there is affirmative evidence in the record of discriminatory discharge. He then says "that Respondent did not immediately effectuate Ekzoozian's threat does not detract from the conclusion herein reached." Here is a statement filled with innuendo! There is no evidence that the threat was ever communicated to Respondent, and Ekzoozian was a mere employee, without any power whatever to hire or fire or to recommend hiring or firing (R. 207).

The foregoing examples demonstrate that the Intermediate Report is not a judicial opinion but is a brief of a party to a litigation.

True, the Trial Examiner found for Respondent on the issue of Ejadian's discharge (R. 23-24) from extra work. In order to do so he credited testimony of Louise Mosesian (R. 178-179)—the witness whom he refused to believe on so many other issues. What is more surprising, he held evidently that this testimony outweighed the testimony of Mrs. Azidigian (R. 179-184) and of Ejadian (R. 154-160) concerning the mes-

sage from Mrs. Mosesian to Ejadian. This testimony thus established that Respondent indulged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act (R. 25), but the evidence was not given weight with respect to a contention of a violation of Section 8(a)(3). Why? It has already been demonstrated that the Examiner was guilty of bias. Perhaps he wished to throw suspicion off the track by holding for Respondent on one minor issue. No other plausible explanation is available.

Pittsburgh Steamship Co. v. N.L.R.B., 167 F. (2d) 126 (C.C.A. 6th, 1948), is directly applicable to this case on the issue of bias. In that case the court observed that "every witness who testified for the Union was found to be reliable and truthful, and all who were called by the Petitioner, evasive and unreliable." 167 F. (2d) 128. The court said, "Courts have recognized that it is contrary to human experience that all witnesses on one side of a case are falsifiers, while those on the other side are all truthful, and this conclusion must be obvious to anyone with even a minimum experience as a trier of facts." 167 F. (2d) 129. The court, therefore, denied enforcement of the Board's order because of the Trial Examiner's bias. The same result must follow in this case.

B. THE DECISION AND ORDER OF THE BOARD EXHIBITS BIAS.

The Board said that it had considered the Intermediate Report, Respondent's exception to brief and the entire record in the case, and "hereby adopts the findings, conclusions and recommendations of the

Trial Examiner," with certain additions and modifications (R. 65-66). It did so in the teeth of Respondent's exceptions (R. 45-63) which plainly called to the Board's attention the bias of the Trial Examiner.

The Board indulges in a misstatement of the effect of the record. It says, "Moreover, the credited testimony of Krikorian and Sohigian established that the Respondent's officials believed that Machoian was responsible for bringing the Union into the warehouse" (R. 66). Certainly the Board had to establish belief in Respondent that Machoian was at least in the Union, but as we have already pointed out Krikorian's testimony merely shows that Ekzoozian and Machoian once argued about Mr. Sohigian, and Mr. Sohigian's testimony only establishes that at some unknown date and occasion Sohigian and the Mosesians talked about Machoian.

The Board then, like the Trial Examiner, proceeded to say that Respondent's no smoking rule, if it existed, was rarely enforced (R. 67). That the rule was always enforced we have repeatedly pointed out in this brief and we shall not weary the court with further references to the record. The lack of foundation in the record for the Board's Decision and Order demonstrates that the Board was biased against Respondent.

This case then must be governed by *Pittsburgh Steamship Co. v. N.L.R.B.,* 167 F. (2d) 126 (C.C.A. 6th, 1948), and enforcement be refused by reason of the fact that Respondent has not had a fair hearing.

IV. PARAGRAPH 1(a) AND (b) AND PARAGRAPH 2(c) OF THE ORDER OF THE BOARD SHOULD NOT BE ENFORCED BECAUSE THE POLICIES OF THE ACT WILL NOT BE EFFECTUATED BY SUCH ENFORCEMENT.

A. THERE IS NO EVIDENCE TO SUPPORT THE TRIAL EXAMINER'S DETERMINATION THAT THERE EXISTS DANGER THAT THE ALLEGED VIOLATIONS OF SECTION 8(a)(1) AND (3) OF THE ACT WILL BE CONTINUED IN THE FUTURE, AND THE BOARD DID NOT FIND THAT THERE IS SUCH DANGER.

The Trial Examiner held that danger of the commission of future unfair labor practices "is to be anticipated from the Respondent's conduct in the past" (R. 38). The Board made no finding with respect to the existence of such danger.

It has already been shown herein that Respondent has committed no unfair labor practices. In any event, the isolated incidents involved in this case, which occurred two years and more ago, are not enough to show that there is danger of commission of similar acts in the future. In *Virginia Electric & Power Co. v. N.L.R.B.*, 115 F. 2d 414 (C.C.A. 4th, 1940), it was held that interrogation of employees by superintendents constituted interference, restraint and coercion. The court found that other unfair labor practices had not occurred as charged and that the questioning constituted the sole unfair labor practice in the case. The court said, "Cease and desist provisions * * * ought not to be enforced because of an incidental finding as to an unfair labor practice of minor character which has long since ceased to be operative or to have any effect. A court of equity will not grant an injunction to restrain one from doing 'what he is not attempting and does not intend to do'

Blease v. Safety Transit Co., 4 Cir., 50 F. (2d) 852, 856." See also *E. I. Dupont de Nemours & Co. v. N.L.R.B.,* 116 F. (2d) 388 (C.C.A. 4th, 1940). Where only minor unfair labor practices of doubtful authenticity are shown, which occurred long ago, if at all, and where there is uncontradicted evidence that the employer went out of its way to assure employees that they might vote as they wished in the representation election, no danger of continuation of unfair labor practices is demonstrated and no need for a cease and desist order is shown.

B. THE BOARD'S ORDER IS IMPROPER BECAUSE IT IS NOT IN COMPLIANCE WITH THE ADMINISTRATIVE PROCEDURE ACT AND THE NATIONAL LABOR RELATIONS ACT.

Section 8(b) of the Administrative Procedure Act, insofar as it is relevant, provides as follows:

> "Submittals and Decisions.—Prior to each * * * decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions * * * exceptions to the decisions or recommended decisions of subordinate officers * * * The record shall show the ruling upon each exception presented. All decisions * * * shall * * * include a statement of (1) findings and conclusions, as well as the reason or basis therefor * * *"

Section 10 (c) of the National Labor Relations Act provides as follows:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in

> or is engaging in any such unfair labor practice, then the Board shall state its findings of fact * * *"

Plainly the Board did not comply with these requirements of law. First, this record does not show the rulings of the Board upon each exception presented by Respondent. It is not apparent that Respondent has been "fully apprised * * * of the Board's ruling upon the exceptions" (p. 19 of the Board's brief). Respondent does not know whether all of them were rejected, or whether some were accepted and some rejected, or whether the Board felt that all the exceptions were well taken but that they nevertheless did not establish error on the part of the Trial Examiner. The quotation in the Board's brief from the committee reports[7] on the Administrative Procedure Act does not bear upon the question whether or not the Board complied with the requirements of the law concerning ruling upon exceptions. The Administrative Procedure Act included this provision concerning exceptions in order that administrative agencies might be compelled, for the sake of the record, to examine into charges of error or bias just such as those which were made in this case. Had the Board reviewed Respondent's exceptions, this long Brief in a simple evidence case would not have been necessary. Instead, had an appeal taken place at all, only the disposition of certain specific exceptions need have been discussed.

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[7]Senate Committee Report 752, 79th Cong., 1st Sess., p. 24; House Report 1980, 79th Cong., 1st Sess., p. 39.

Second, the Board did not state its findings of fact, as required by Section 10 (c) of the National Labor Relations Act and by Section 8 (b) of the Administrative Procedure Act. The Board in this case issued a "Decision and Order," which says that the Board agrees with some things the Trial Examiner said and that it disagrees with other things he said. Respondent can only assume that the Board's findings of fact are contained somewhere on pages 66 and 67 of the record, since they are nowhere plainly or separately stated.

Third, the Board's decision did not include any statement of the reasons or bases for its findings and conclusions, as required by Section 8 (b) of the Administrative Procedure Act. The congressional committees reported as follows concerning this requirement:

> The requirement that the agency must state the basis for its findings and conclusions means that such findings and conclusions must be sufficiently related to the record as to advise the parties of their record basis. (Senate Report 752, 79th Cong., 1st Sess., p. 24; House Report 1980, 79th Cong., 1st Sess., p. 39).

Failure of the Board to meet this requirement is most obvious in the discussion (R. 67) of Respondent's no smoking rule. The result is that Respondent has been compelled to take the time of the Court to point out what the reasons or bases of the findings must have been and to show that such reasons or bases are insufficient. The noncompliance of the

Board with this requirement of law is too obvious to require further comment.

Denial of enforcement of the Board's order in this case will serve a much-needed warning upon the Board that it is to comply with the law in preparing its decisions.

CONCLUSION.

It is respectfully submitted to this Court that the record shows that there is no substantial evidence, when the record is considered as a whole, that Respondent has ever committed an unfair labor practice. It is submitted that Respondent did not discriminately discharge Moses Machoian and that Respondent never committed any act which constituted interference, restraint and coercion of its employees with respect to the rights guaranteed by Section 7 of the Act. It is submitted that the Board and its Trial Examiner did not grant Respondent a fair hearing. Finally, it is submitted that the Decision and Order of the Board is improper and invalid in that it is unnecessary and is not in compliance with Section 8 (b) of the Administrative Procedure Act or with Section 10 (c) of the National Labor Relations Act.

Dated, Fresno, California,
May 28, 1951.

Respectfully submitted,
HOWARD B. THOMAS,
Attorney for Respondent.

(Appendix Follows.)

Appendix.

Appendix

The relevant provisions of the National Labor Relations Act, as amended by Section 101 of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. Sec. 141 *et seq.*) are as follows:

"RIGHTS OF EMPLOYEES.

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *

"UNFAIR LABOR PRACTICES.

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

"SEC. 8. (c) The expressing of any views, argument, or opinion, of the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat or reprisal or force or promise of benefit.

"PREVENTION OF UNFAIR LABOR PRACTICES.

"SEC. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

"SEC. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth

in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *"

The relevant provision of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 *et seq.*, is as follows:

"SEC. 8. (b) SUBMITTALS AND DECISIONS.

"* * * The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."